

ORDINANCE NO. 04-1003

AN ORDINANCE of the City Council of the City of SeaTac, Washington, granting unto the Federal Aviation Administration, an Agency of the Federal Government, a nonexclusive franchise to construct, maintain, and operate certain facilities within public right-of-ways and public properties of the City.

WHEREAS, RCW 35A.47.040 authorizes the City to grant, permit, and regulate nonexclusive franchises for the use of public streets, right-of-ways, and other public property for public conveyances, for transmission of electrical energy, for transmission of communications, and for gas, steam, fuel, water, and sewer systems; and

WHEREAS, the grant of such franchises requires the approving vote of at least a majority of the entire City Council; and

WHEREAS, the Council finds that the grant of the franchise contained in this Ordinance, subject to its terms and conditions, is in the best interests of the public;

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF SEATAC, WASHINGTON, DO ORDAIN as follows:

The City of SeaTac, a Washington municipal corporation (hereinafter the "City"), hereby grants unto the Federal Aviation Administration, an Agency of the Federal Government, (hereinafter "Grantee"), a franchise for a period of fifteen (15) years, beginning on the effective date of this Ordinance, to install, construct, operate, maintain, replace, and use all necessary equipment and facilities for telecommunication and electrical systems, in, under, on, across, over, through, along or below the public right-of-ways and public places located in the City of SeaTac, as approved under City permits issued pursuant to this franchise.

1. Non-Exclusivity. This franchise is granted upon the express condition that it shall not in any manner prevent the City from granting other or further franchises in, under, on, across, over, through, along or below any right-of-ways, streets, avenues and all other public lands and properties of every type and description. This and other franchises shall, in no way, prevent or prohibit the City from using any of its right-of-ways, roads, streets or other public properties or affect its jurisdiction over them or any part of them, and the City hereby retains full power to make all changes, relocations, repairs, maintenance, establishments, improvements, dedications or

vacation of same as the City may deem fit, including the dedication, establishment, maintenance, and improvement of all new right-of-ways, streets, avenues, thoroughfares and other public properties of every type and description.

2. Right-of-Way Permits Required. Whenever Grantee shall excavate in any public right-of-way or other public property for the purpose of installation, construction, repair, maintenance or relocation of its facilities, it shall apply to the City for a permit to do so, together with detailed plans and specifications showing the position, depth, and location of all such facilities in relation to existing City right-of-ways, roads, streets, or other City property, hereinafter collectively referred to as the "Plans". In no case shall any work commence within any public right-of-way or other public property without a valid permit. The Grantee shall, prior to commencing permitted work, give the City not less than two (2) full working days notice thereof. The facilities shall be installed or constructed in exact conformity with said Plans except in instances in which deviation may be allowed by the City, in writing, in response to written application by Grantee. The Plans shall specify the class and type of material and equipment to be used, manner of excavation, construction, installation, backfill, erection of temporary structures and facilities, erection of permanent structures and facilities, traffic control, traffic turnouts and road obstructions, and all other necessary information. During the progress of the work, Grantee shall not unnecessarily obstruct the passage or proper use of the right-of-ways. Grantee shall file as-built plans and maps with the City showing the final location of the facilities. All restoration of right-of-ways, roads, streets and the surface of other public property shall be in conformance with City standards, and conditions of the permit.

3. Emergency Work. In the event of any emergency in which any of Grantee's facilities break, are damaged, or if Grantee's facilities or construction areas are otherwise in such a condition as to immediately endanger any property, life, health, or safety, Grantee shall immediately inform the City permitting authority of the location and condition and shall immediately take all necessary actions to repair its facilities, and to cure or remedy any dangerous conditions. Such emergency work may be commenced without first applying for and obtaining a permit as required by this franchise. However, this provision shall not relieve Grantee from the requirement of obtaining any permits necessary for this purpose, and Grantee shall apply for all such permits not later than the next succeeding day during which the City is open for business.

4. Inspections and Fees. All work performed by Grantee shall be subject to inspection by and approval of the City. The Grantee shall reimburse the City for all expenses incurred by the City in the examination, inspection, and approval of Grantee's work. Such reimbursement shall be in addition to any other fees or charges levied by the City.

5. Commencement of Construction. Construction of the facilities contemplated by this franchise shall commence no later than the effective date of this Ordinance, provided that such time limit shall not apply to delays caused by acts of God, strike or other occurrences over which Grantee has no control. No right-of-way use fee shall be imposed at this time. However, at such time as a right-of-way use fee is imposed by City Ordinance, applicable to Grantee, the same will be imposed after sixty (60) days notice from the City to the Grantee.

6. Special Construction Standards. During any period of work relating to Grantee's facilities, all surface structures and equipment, if any, shall be erected and used in such places and positions within or adjacent to public right-of-ways and other public properties so as to interfere as little as possible with the free passage of vehicular and pedestrian traffic and the free use of adjoining property. Grantee shall, at all times, post and maintain proper barricades and comply with all applicable safety regulations during such period of construction as required by the ordinances of the City, conditions of permits, and laws and regulations of the State of Washington, specifically including **RCW 39.04.180** for the construction of trench safety systems.

If Grantee shall at any time be required, or plan, to excavate trenches in any area covered by this Ordinance, the Grantee shall afford the City an opportunity to permit other franchisees and utilities to share such excavated trenches, PROVIDED THAT: (1) such joint use shall not unreasonably delay the work of the Grantee; and (2) such joint use shall not adversely affect Grantee's facilities or safety thereof. When deemed appropriate by the City, joint users may be required to contribute to the costs of excavation and filling.

7. Restoration After Construction. Grantee shall, after abandonment approved under Section 10 herein, or any other installation, construction, relocation, maintenance, or repair of facilities within the franchise area, restore the surface of the right-of-way or public property to at least the condition that the same was in immediately prior to any such work. All concrete encased monuments which have been disturbed or displaced by such work shall be restored pursuant to all federal, state and local standards and specifications. Grantee agrees to promptly complete all restoration work and to promptly repair any damage caused by such work within the franchise area or other affected area at its sole cost and expense.

8. Dangerous Conditions - Authority of City to Abate. Whenever excavation, installation, construction, repair, maintenance, or relocation of facilities authorized by this franchise has caused or contributed to a condition that appears to substantially impair the lateral support of the adjoining right-of-way, road, street or other public place, or endangers the public, adjoining public or private property or street utilities, the City may direct Grantee, at Grantee's sole expense, to take all necessary actions to protect the public and property. The City may require that such action be completed within a prescribed time.

In the event that Grantee fails or refuses to promptly take the actions directed by the City, or fails to fully comply with such directions, or if emergency conditions exist which require immediate action, the City may enter upon the property and take such actions as are necessary to protect the public, adjacent public or private property, or street utilities, or to maintain the lateral support thereof, and all other actions deemed by the City to be necessary safety precautions; and Grantee shall be liable to the City for all costs and expenses thereof.

9. Relocation of Facilities. Grantee agrees and covenants, at its sole cost and expense, to protect, support, temporarily disconnect, relocate or remove from any street any of its installations when so required by the City by reason of traffic conditions or public safety, dedications of new right-of-ways and the establishment and improvement thereof, freeway construction, change or establishment of street grade, or the construction of any public

improvement or structure, provided that Grantee shall in all such cases have the privilege to temporarily bypass, in the authorized portion of the same street upon approval by the City, any section of their facilities required to be temporarily disconnected or removed.

If the City determines that the project necessitates the relocation of Grantee's then existing facilities, the City shall:

- a) At least sixty (60) days prior to the commencement of such improvement project, provide Grantee with written notice requiring such relocation; and
- b) Provide Grantee with copies of pertinent portions of the plans and specifications for such improvement project and a proposed location for Grantee's facilities so that Grantee may relocate its facilities in other City right-of-way in order to accommodate such improvement project.
- c) After receipt of such notice and such plans and specification, Grantee shall complete relocation of its facilities at no charge or expense to the City so as to accommodate the improvement project at least ten (10) days prior to commencement of the project.

Grantee may, after receipt of written notice requesting a relocation of its facilities, submit to the City written alternatives to such relocation. The City shall evaluate such alternatives and advise Grantee in writing if one or more of the alternatives is suitable to accommodate the work which would otherwise necessitate relocation of the facilities. If so requested by the City, Grantee shall submit additional information to assist the City in making such evaluation. The City shall give each alternative proposed by Grantee full and fair consideration. In the event the City ultimately determines that there is no other reasonable alternative, Grantee shall relocate its facilities as otherwise provided in this Section.

The provisions of this Section shall in no manner preclude or restrict Grantee from making any arrangements it may deem appropriate when responding to a request for relocation of its facilities by any person or entity other than the City, where the facilities to be constructed by said person or entity are not or will not become City owned, operated or maintained facilities, provided that such arrangements do not unduly delay a City construction project.

10. Abandonment of Grantee's Facilities. No facility constructed or owned by Grantee may be abandoned without the express written consent of the City. Any plan for abandonment or removal of Grantee's facilities must be first approved by the City, and all necessary permits must be obtained prior to such work.

11. Grantee's Maps and Records. After construction is complete, and as a condition of this franchise, Grantee shall provide to the City at no cost, a copy of all accurate as-built plans, maps and records.

12. Recovery of Costs. Grantee shall be subject to all permit fees associated with activities undertaken through the authority granted in this franchise or under ordinances of the

City. Where the City incurs costs and expenses for review or inspection of activities undertaken through the authority granted in this franchise or any ordinances relating to the subject for which a permit fee is not established, Grantee shall pay such costs and expenses directly to the City. In addition to the above, Grantee shall promptly reimburse the City for any and all costs it reasonably incurs in response to any emergency involving Grantee's facilities.

13. Limitation on Future Work. In the event that Grantor reconstructs a new roadway, the Grantee shall not be permitted to excavate such roadway for a period of five (5) years absent emergency circumstances.

14. Remedies to Enforce Compliance. In addition to any other remedy provided herein, the City reserve the right to pursue any remedy to compel or force Grantee and/or its successors and assigns to comply with the terms hereof, and the pursuit of any right or remedy by the City shall not prevent the City from thereafter declaring a forfeiture or revocation for breach of the conditions herein.

15. City Ordinances and Regulations. Nothing herein shall be deemed to direct or restrict the City's ability to adopt and enforce all necessary and appropriate ordinances regulating the performance of the conditions of this franchise, including any reasonable ordinances made in the exercise of its police powers in the interest of public safety and for the welfare of the public. The City shall have the authority at all times to control by appropriate regulations the location, elevation, and manner of construction and maintenance of any facilities by Grantee, and Grantee shall promptly conform with all such regulations, unless compliance would cause Grantee to violate other requirements of law.

16. Vacation. If, at any time, the City shall vacate any City road, right-of-way or other City property which is subject to rights granted by this franchise and said vacation shall be for the purpose of acquiring the fee or other property interest in said road, right-of-way or other City property for the use of the City, in either its proprietary or governmental capacity, then the City may, at its option and by giving thirty (30) days written notice to the grantee, terminate this franchise with reference to such City road, right-of-way or other City property so vacated, and the City shall not be liable for any damages or loss to the grantee by reason of such termination.

17. Indemnification. Grantee hereby releases, covenants not to bring suit and agrees to indemnify, defend and hold harmless the City, its officers, employees, agents and representatives from any and all claims, costs, judgments, awards or liability to any person, including claims by Grantee's own employees to which Grantee might otherwise be immune under Title 51 RCW, arising from injury or death of any person or damage to property of which the negligent acts or omissions of Grantee, its agents, servants, officers or employees in performing services under this franchise are the proximate cause. Grantee further releases, covenants not to bring suit and agrees to indemnify, defend and hold harmless the City, its officers and employees from any and all claims, costs, judgments, awards or liability to any person, including claims by Grantee's own employees to which Grantee might otherwise have immunity under Title 51 RCW, arising against the City solely by virtue of the City's ownership or control of the right-of-ways or other public properties, by virtue of Grantee's exercise of the rights granted herein, or by virtue of the City's permitting Grantee's use of the City's right-of-ways or other public property based upon the

inspection or lack of inspection of work performed by Grantee, its agents and servants, officers or employees in connection with work authorized on the City's property or property over which the City has control, pursuant to this franchise or pursuant to any other permit or approval issued in connection with this franchise. This covenant of indemnification shall include, but not be limited by this reference, to claims against the City arising as a result of the negligent acts or omissions of Grantee, its agents, servants, officers or employees in barricading, instituting trench safety systems or providing adequate warnings of any excavation, construction, or work in any public right-of-way or other public place in performance of work or services permitted under this franchise.

Inspection or acceptance by the City of any work performed by Grantee at the time of completion of construction shall not be grounds for avoidance of any of these covenants of indemnification. Said indemnification obligations shall extend to claims which are not reduced to a suit and any claims which may be compromised prior to the culmination of any litigation or the institution of any litigation.

In the event that Grantee refuses to accept the tender of defense in any suit or any claim, said tender having been made pursuant to the indemnification clauses contained herein, and said refusal is subsequently determined by a court having jurisdiction (or such other tribunal that the parties shall agree to decide the matter), to have been a wrongful refusal on the part of Grantee, then Grantee shall pay all of the City's costs for defense of the action, including all reasonable expert witness fees and reasonable attorneys' fees and the reasonable costs of the City, including reasonable attorneys' fees of recovering under this indemnification clause.

Should a court of competent jurisdiction (or such other tribunal that the parties shall agree to decide the matter) determine that this franchise, or work conducted under authority of this franchise, is subject to **RCW 4.24.115**, then, in the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of Grantee and the City, its officers, employees and agents, Grantee's liability hereunder shall be only to the extent of Grantee's negligence. It is further specifically and expressly understood that the indemnification provided herein constitutes Grantee's waiver of immunity under Title **51 RCW**, solely for the purpose of this indemnification. This waiver has been mutually negotiated by the parties.

The provisions of this Section shall survive the expiration or termination of this franchise agreement, for a period of three (3) years.

18. **Insurance and Bond.** Grantee is self-insured and shall not be required to provide a certificate of insurance or bond for work covered under this franchise.

19. **Modification.** The City and Grantee hereby reserve the right to alter, amend or modify the terms and conditions of this franchise upon written agreement of both parties to such alteration, amendment or modification.

20. **Forfeiture and Revocation.** If Grantee willfully violates or fails to comply with any of the provisions of this franchise, or through willful or unreasonable negligence fails to heed or comply with any notice given Grantee by the City under the provisions of this franchise, then

Grantee shall, at the election of the City, forfeit all rights conferred hereunder and this franchise may be revoked or annulled by the City after a hearing held upon reasonable notice to Grantee. The City may elect, in lieu of the above and without any prejudice to any of its other legal rights and remedies, to obtain an order from the superior court having jurisdiction compelling Grantee to comply with the provisions of this franchise and to recover damages and costs incurred by the City by reason of Grantee's failure to comply.

21. Assignment. This franchise may not be assigned or transferred without the written approval of the City. For purposes hereof, the grant of any security agreement or security interest in the facilities of the Grantee to secure any financing or refinancing, shall constitute an assignment of this franchise for which written approval would be required. In the case of the transfer or assignment as collateral for a mortgage or other security instrument in whole or in part to secure indebtedness, such consent shall not be required unless and until the secured party elects to realize upon the collateral. Grantee shall provide prompt, written notice to the City of any such assignment.

22. Costs of Publication. The cost of the preliminary and/or final publication of this Ordinance and/or its Ordinance Summary shall be borne by Grantee.

23. Acceptance. Not later than thirty (30) days after passage and publication of this Ordinance, the Grantee must accept the franchise herein by filing with the City Clerk an unconditional written acceptance thereof. Failure of Grantee to so accept this franchise within said period of time shall be deemed a rejection thereof by Grantee, and the rights and privileges herein granted shall, after the expiration of the five day period, absolutely cease, unless the time period is extended by ordinance duly passed for that purpose.

24. Survival. All of the provisions, conditions and requirements of Sections: 7 Special Construction Standards; 8 Restoration After Construction; 9 Dangerous Conditions; 10 Relocation of Facilities; 11 Abandonment of Grantee's Facilities; and 17 Indemnification, of this franchise shall be in addition to any and all other obligations and liabilities Grantee may have to the City at common law, by statute, by ordinance, or by contract, and shall survive termination of this franchise, and any renewals or extensions hereof. All of the provisions, conditions, regulations and requirements contained in this franchise shall further be binding upon the heirs, successors, executors, administrators, legal representatives and assigns of Grantee and all privileges, as well as all obligations and liabilities of Grantee shall inure to its heirs, successors and assigns equally as if they were specifically mentioned wherever Grantee is named herein.

25. Severability. If any section, sentence, clause or phrase of this Ordinance should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this franchise Ordinance. In the event that any of the provisions of this franchise are held to be invalid by a court of competent jurisdiction, the City reserves the right to reconsider the grant of this franchise and may amend, repeal, add, replace or modify any other provision of this franchise, or may terminate this franchise.

26. Renewal. In the event the time period granted by this franchise expires without

being renewed by the City, the terms and conditions hereof shall continue in effect until this franchise is renewed or terminated by the City.

27. **Notice.** Any notice or information required or permitted to be given by or to the parties under this franchise may be sent to the following addresses unless otherwise specified, in writing:

City Manager
City of SeaTac
17900 International Blvd.
Suite 401
SeaTac, WA 98188
(206) 973-4800

Lisa L. Mansfield
Real Estate Contracting Officer
1601 Lind Avenue S. W.
Renton, Washington 98055-4056
(425) 227-1592

28. **Effective Date.** This Ordinance shall be in full force and in effect five (5) days after passage and publication.

ADOPTED this 27th day of January, 2004, and signed in authentication thereof on this 27th day of January, 2004.

CITY OF SEATAC

Frank Hansen, Mayor

ATTEST:

Judith L. Cary, City Clerk

Approved as to Form:

Mary E. Mirante-Bartolo, City Attorney